Word Music, LLC et al v. Priddis Music, Inc. et al Doc. 23

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

WORD MUSIC, LLC., a Tennessee Limited Liability company, DAYSPRING MUSIC, LLC, a Tennessee Limited Liability Company, WORDSPRING MUSIC, LLC., a Tennessee Limited Liability company, UNICHAPPELL MUSIC, INC., a Delaware corporation, CHAPPELL & CO., INC., a Delaware corporation, COTILLION MUSIC, INC., a Delaware Corporation, RIGHTSONG MUSIC, INC., a Delaware Corporation, WALDEN MUSIC, INC., a New York Corporation, WARNER/TAMERLANE PUBLISHING CORP., a California corporation, and WB MUSIC CORP., a California corporation,

Plaintiff,

vs.-

PRIDDIS MUSIC, INC., a Nevada corporation, RICHARD L. PRIDDIS, individually, PROSOUND KARAOKE LTD., a United Kingdom corporation, MEDIOSTREAM, INC., a California corporation, d/b/a "K SUPERSTAR," D.J. MILLER MUSIC DISTRIBUTORS, INC., a Colorado corporation, d/b/a "PROSING," and DALE S. MILLER, Individually

Defendants.

Case No. 3:07-cv-502

JURY DEMAND

Judge Haynes

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PRIDDIS DEFENDANTS' MOTION TO DISMISS

NOW COME the Plaintiffs, WORD MUSIC, LLC., a Tennessee Limited Liability Company, DAYSPRING MUSIC, LLC, a Tennessee Limited Liability Company, WORDSPRING MUSIC, LLC., a Tennessee Limited Liability company, UNICHAPPELL MUSIC, INC., a Delaware corporation, CHAPPELL & CO., INC., a Delaware corporation,

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COTILLION MUSIC, INC., a Delaware Corporation, RIGHTSONG MUSIC, INC., a Delaware Corporation, WALDEN MUSIC, INC., a New York Corporation, WARNER/TAMERLANE PUBLISHING CORP., a California corporation, and WB MUSIC CORP., a California corporation, ("Plaintiffs"), by and through their attorneys, Paul Harrison Stacey, Law Offices of Paul Harrison Stacey, P.C. and Timothy L. Warnock, Bowen, Riley, Warnock & Jacobson, PLC, and for their **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PRIDDIS DEFENDANTS' MOTION TO DISMISS**, state as follows:

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I. INTRODUCTION

Defendants PRIDDIS MUSIC, INC., PROSOUND KARAOKE, LTD. And RICHARD L. PRIDDIS, individually, ("PRIDDID Defendants") have moved to dismiss Plaintiffs' copyright infringement and unfair competition lawsuit based upon the assertion that the "first to file" rule mandates dismissal. While it is true that one of the Defendants (*not* any of the PRIDDIS Defendants, which are the movants before the Court) filed a purported Declaratory Judgment action in California just days before this lawsuit was filed, Plaintiffs are the ***rightful*** parties to bring an action based upon infringement of their music copyrights. The *ersatz* declaratory judgment action filed by MEDIOSTREAM, INC. in the Northern District of California does not involve the same parties, does not involve the same issues, does not seek to provide the same or proper relief to which Plaintiffs are entitled, does not seek a declaration of rights regarding *future* conduct and was instituted purely as a "race to the courthouse" tactic to deprive these Plaintiffs of their proper forum for bringing suit. For these reasons and others explained herein, Plaintiffs urge this Court to deny Defendants' Motion and to compel them to answer or otherwise plead within a time certain.

In further support hereof, Plaintiffs have filed the **DECLARATION OF PAUL HARRISON STACEY** and **DECLARATION OF DOROTHY D. GIBBY** concurrently herewith.

II. FACTUAL BACKGROUND

Plaintiffs are music publishers that own or control the copyrights to thousands of well known and popular music compositions that have been recorded, reproduced, distributed, marketed, advertised, "sampled" and sold without Plaintiffs' authorization by the various Defendants' karaoke businesses. (COMPLAINT, p. 7, para. 24). On or about January 26, 2007, counsel for Plaintiffs sent a cease and desist letter to each of the Defendants, and/or their attorneys/registered agents, citing them for copyright infringement and related matters for hundreds of music copyrights owned and/or administered in whole or in part by Plaintiffs. (Stacey Declaration, ¶ 2, Exhibit "A" thereto). Thereafter, the various Defendants, MEDIOSTREAM and the PRIDDIS Defendants in particular communicated with Plaintiffs' counsel to indicate that they had ceased all infringing activities. (Stacey Declaration, ¶ 3, Exhibit "B" thereto).

While numerous discussions ensued between MEDIOSTREAM and Plaintiffs' counsel, the PRIDDIS Defendants, apart from two brief items of faxed correspondence, were largely unresponsive. In the process of investigating the representations made by the PRIDDIS Defendants in those two brief items of correspondence, it became clear that the facts demonstrated that the PRIDDIS Defendants were not being truthful when they represented that they had …"exited the Karaoke business;" indeed, they were continuing to infringe Plaintiffs' copyrights unabated. (Stacey Decl., ¶ 4) PRIDDIS Defendants' infringing recordings of Plaintiffs' copyrights were purchased via an interactive internet website from Nashville, Tennessee, on or about March 14, 2007. (Gibby Declaration, ¶ 3, Exhibit "A" thereto). While the PROSING Defendants orally communicated that steps were being taken to remove all infringing materials from their website, Plaintiffs' counsel was able to access the interactive internet karaoke website and see infringing materials being advertised for sale. Similar purchases of Defendant PROSOUND's infringing recordings of Plaintiffs' music copyrights were then made by Ms. Gibby, through Defendant PROSING's interactive internet website, from Nashville on March 20, 2007. (Gibby Declaration, ¶ 4, Exhibit "B" thereto).

During the ensuing weeks and to Defendant MEDIOSTREAM's partial credit, MEDIOSTREAM and/or its attorney was fully communicative with Plaintiffs' counsel and at least appeared at that time to be fully compliant with Plaintiffs' cease and desist demand. Nevertheless, in light of the Co-Defendants' failures and refusals to cease and desist, Plaintiffs' counsel informed MEDIOSTREAM that it would be necessary to institute suit against all defendants to establish some control over the infringements and seek injunctive relief either by agreement or on a contested basis. In response to Plaintiff counsel's inquiry to MEDIOSTREAM counsel whether or not he would accept service of the Complaint, MEDIOSTREAM instead filed its purported action for Declaratory Judgment in the United States District Court for the Northern District of California on April 17, 2007. (Stacey Declaration, ¶ 5, Exhibit "C" thereto), (hereinafter, "MEDIOSTREAM litigation"). The MEDIOSTREAM litigation named WARNER/CHAPPELL MUSIC, INC., which is not a named

Plaintiff in this lawsuit, as well as PRIDDIS MUSIC, INC. The MEDIOSTREAM Complaint does *not* allege that MEDIOSTREAM actually possessed (or possesses) any lawful rights in the copyrights or licensing upon which they relied in seeking a declaration of any rights to use any of the music, or that it sought the declaration with regard to guidance with respect to its future course of dealings. Rather, it merely recited the threatened infringement litigation over its past conduct and made the bare assertion of a "dispute" with respect to which they sought a general declaration of the parties' rights. The MEDIOSTREAM complaint also sought "indemnification" from PRIDDIS MUSIC, in the event liability was imposed on it for its past acts, even though no claim had been made against it in the case. (Stacey Declaration, Exhibit "C" thereto).

This litigation was brought on behalf of the rightful owners/administrators of the 345 music copyrights infringed by the Defendants named in this case. It names not only MEDIOSTREAM and PRIDDIS MUSIC, INC. as Defendants, but names related entities PROSOUND KARAOKE LIMITED, a United Kingdom Corporation owned by PRIDDIS, as well as RICHARD L. PRIDDIS, individually. The suit also names DJ MILLER MUSIC DISTRIBUTORS, INC., a Colorado corporation, d/b/a "PROSING" and DALE S. MILLER individually ("MILLER Defendants"). (See, e.g., COMPLAINT FOR INJUNCTION AND DAMAGES filed herein, ¶¶ 27-29. ((The MILLER Defendants advertise themselves as the U.S. distributing partners of PROSOUND KARAOKE LTD.)) The complaint in this case also seeks injunctive relief against all of the defendants as well as alternative damages options pursuant to the Copyright Act and attorneys' fees and costs.

III. ARGUMENT

a.) MEDIOSTREAM's Anticipatory Filing is Exempt from the First-to-File Rule

The United States Supreme Court has expressly held that "the manufacturer who is charged with infringing…cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity." *Kerotest Mfg. Co. vs. C-O-Two Fire Equip. Co.*, 342 U.S.180, 185. (1952) In *Kerotest*, the Supreme Court affirmed the Third Circuit Court of Appeals reversal of a Delaware District Court's grant of a Preliminary Injunction restraining a patent owners later filed suit for infringement in an Illinois District Court. This principle has been extended to preclude the anticipatory filing of purported declaratory judgment actions where, as in this case, the only asserted basis is the threat of suit by an injured party. (*See Hyatt Int'l Corp. v. Coco,* 302 F.3d 707, 712 (7th Cir. 2002) ("[The] Act is not a tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff by winning the proverbial race to the courthouse." (internal quotation marks omitted); See also, *NGS Am., Inc. v. Jefferson,* 218 F.3d 519, 523 (6th Cir.2000), wherein the Court stated: "[A] rule permitting [this sort of declaratory] action could frustrate a plaintiff's choice of forum and encourage forum shopping, races to the courthouse, needless litigation occasioning waste of judicial resources, delay in the resolution of controversies, and misuse of judicial process to harass an opponent in litigation…." (irrespective of the actual motives of the declaratory plaintiff); and *BASF Corp. v. Symington,* 50 F.3d 555, 558-59 (8th Cir.1995) ("declaratory actions founded exclusively on a defense to a state law claim should be dismissed as a tactical maneuver calculated to deny potential plaintiffs of their traditional right to choose the forum and time of suit"; "the natural plaintiff's choice of forum and law will be disturbed only in exceptional circumstances"); *Tempco*, 819 F.2d at 750 ("[T]he federal declaratory judgment is not a prize to the winner of the race to the courthouse." (internal quotation marks omitted)); *UAW v. Dana Corp.*, 1999 U.S. Dist. LEXIS 22525, *5-*6 (N.D.Ohio Dec.6, 1999) (where declaratory plaintiff filed suit in order to "preempt the choice of forum that otherwise would be for the union to make," declaratory judgment inappropriate; noting "a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit," and that at the least, "the declaratory judgment plaintiff should have the burden or showing persuasive cause why its suit should not be enjoined").

Moreover, an examination of the declaratory complaint filed by MEDIOSTREAM demonstrates that it asserts only that it relied on some undisclosed agreement with PRIDDIS MUSIC that the music it was using, advertising and selling on its website was licensed. Yet, as the Court of Appeals for the Eight Circuit has held: "[T]he Declaratory Judgment Act is not to be used to bring to the federal courts an affirmative defense which can be asserted in a pending state action." (*Int'l Ass'n of Entrepreneurs v. Angoff*, 58 F.3d 1266, 1270 (8th Cir.1995) *cert. denied*, 516 U.S. 1072, 116 S.Ct. 774, 133 L.Ed.2d 726 (1996))

The Sixth Circuit has followed the *Kerotest* authority with its decision in *AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004). In *AmSouth*, the Sixth Circuit held that "[n]ormally when a punitive tortfeasor sues an injured party for declaration of non-liability, courts will decline to hear the action in favor of a subsequently-filed coercive action by the "natural Plaintiff." *AmSouth*, at 786. The Sixth Circuit reasoned that this is so because "[c]ourts take a dim view of declaratory Plaintiffs who file their suits mere days or weeks before the coercive suits filed by a "natural Plaintiff" and who seem to have done so for the purpose of acquiring a favorable forum." *AmSouth Bank v. Dale*, 386 F.3d at 788. Thus, Courts routinely exercise their discretion to dismiss the first filed declaratory judgment action in such situations. *See Id.*

Furthermore, where the declaratory judgment action was filed in anticipation of the intellectual property infringement action, the case law from other circuits is clear – the infringement action should proceed, even if the infringement action was filed after the declaratory judgment action. *See Id.* (citing *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987)). Multiple policy reasons support this exception to the first-to-file rule. First, it "seek[s] to eliminate the race to the courthouse door in an attempt to preempt the later filed suit in another forum." *Guthy-Renker Fitness, L.L.C. vs. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 271 (C.D. Cal. 1998). Second, imposing the first-to-file rule in circumstances of an anticipatory filing discourages settlement negotiations and other attempts to resolve disputes prior to litigation. *Xoxide, Inc. v. Ford Motor Co.*, 448 F.Supp.2d 1188, 1194 (C.D.-Cal. 2006) (quoting *Z-line Designs, Inc. v. Bell'O Int'l, L.L.C.*, 218 F.R.D., 663, 667 (N.D. Cal. 2003) (citing *Ward v. Follett Corp.*, 158 F.R.D. 645, 648, N.D. Cal. 1994).

The "race to the courthouse door" criticized in *Guthy-Renker* has been rejected by other Courts as well, including the Sixth Circuit: "…where a putative defendant files a declaratory action whose only purpose is to defeat liability in a subsequent coercive suit, no real value is served by the declaratory judgment except to guarantee to the declaratory plaintiff her choice of forum-a guarantee that cannot be given consonant with the policy underlying the Declaratory Judgment Act. *See* Hyatt Int'l, 302 F.3d at 712 (the Act "is not a tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff by winning the proverbial race to the courthouse." (internal quotation marks omitted)); *NGS Am., Inc. v. Jefferson*, 218 F.3d 519, 523 (6th Cir.2000) ("[A] rule permitting [this sort of declaratory] action could frustrate a plaintiff's choice of forum and encourage forum shopping, races to the courthouse, needless litigation occasioning waste of judicial resources, delay in the resolution of controversies, and misuse of judicial process to harass an opponent in litigation," irrespective of the actual motives of the declaratory plaintiff); *BASF Corp. v. Symington,* 50 F.3d 555, 558-59 (8th Cir.1995) ("declaratory actions founded exclusively on a defense to a state law claim should be dismissed as a tactical maneuver calculated to deny potential plaintiffs of their traditional right to choose the forum and time of suit"; "the natural plaintiff's choice of forum and law will be disturbed only in exceptional circumstances"); *Tempco*, 819 F.2d at 750 ("[T]he federal declaratory judgment is not a prize to the winner of the race to the courthouse." (internal quotation marks omitted)); *UAW v. Dana Corp.*, 1999 U.S. Dist. LEXIS 22525, *5-*6 (N.D.Ohio Dec.6, 1999) (where declaratory plaintiff filed suit in order to "preempt the choice of forum that otherwise would be for the union to make," declaratory judgment inappropriate; noting "a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit," and that at the least, "the declaratory judgment plaintiff should have the burden or showing persuasive cause why its suit should not be enjoined").

b.) MEDIOSTREAM's Case Does Not Meet the First-to-File Requirements

According to the United States Court of Appeals for the Ninth Circuit, District Courts must consider the following threshold factors when deciding whether to apply the first-to-file rule: 1)The chronology of the two actions; 2) The similarity of the parties; and 3) The similarity of the issues. (*Pace Setter Systems, Inc., v. Medtronic, Inc.* 678 F.2d 93, 95 (9th Circuit 1982); *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994) While it is true that MEDIOSTREAM files its initial Complaint prior in time to the Plaintiffs' Complaint in this case (April 17, 2007 v. May 8, 2007), thus satisfying the first criteria, that is the *only* factor which could conceivably be relied upon by the PRIDDIS Defendants to support a dismissal of this action; mere chronology is not enough. Specifically, the PRIDDIS Defendants themselves have filed no earlier case. Moreover, while there is similarity with respect to some parties, there is a conspicuous absence of necessary Defendants *vis-a-vie*, the Plaintiffs' claims for copyright infringement, i.e., RICHARD L. PRIDDIS, individually, PROSOUND KARAOKE LIMITED, a United Kingdom Corporation, DJ MILLER MUSIC DISTRIBUTORS, INC., a Colorado Corporation, and DALE S. MILLER, individually, are named Defendants in the *instant* lawsuit, based upon their infringing activities in conjunction with the other Co-Defendants. The hastily filed MEDIOSTREAM litigation in the Northern District of California has yet to name these parties even though their Complaint has already been amended once. (STACEY DECLARATION, ¶7 through 8), Exhibits "C" and "D" thereto).

As well, the MEDIOSTREAM case does not even come close to presenting similar issues. MEDIOSTREAM sought in its initial Complaint, as well as its Amended Complaint, nothing more than a declaration with regard to unspecified rights relating to their *past conduct* with respect to the their unlicensed exploitation of the Plaintiffs' music copyrights. While MEDIOSTREAM seeks in rather peculiar fashion "indemnification" from PRIDDIS MUSIC, there is no underlying predicate claim against MEDIOSTREAM pending in the Northern District of California with respect to which indemnification may be properly sought. (The claims against PRIDDIS in that case could not possibly be more anticipatory.) Moreover, it is not incumbent or obligatory on these Plaintiffs to accede to the manipulation and anticipatory filing by MEDIOSTREAM by supplying the predicate infringement claims in order to cure the otherwise absurd pleading which MEDIOSTREAM has filed.[1]

[1] Indeed, if the MEDIOSTREAM case is not voluntarily dismissed, a Motion to Dismiss will be filed soon. Plaintiffs have no intention of being forced to litigate their claims in the Northern District of California when a *properly filed* case is pending here in the Middle District of Tennessee.

Lastly, the relief sought by the Plaintiffs in this case, namely injunctive relief and alternative damages options based upon multiple acts of copyright infringement, as well as damages for their unfair competition claims, are nowhere to be found in the MEDIOSTREAM case. A simple cursory reading of the MEDIOSTREAM Complaint demonstrates that the requisite elements for application of the first-to-file rule are conspicuously missing and the PRIDDIS Defendants cannot rely on that rule in an attempt to dismiss this case in the Middle District of Tennessee.

c.) Priddis Misrepresentations

The PRIDDIS Defendants also urge this Court to dismiss Plaintiffs' claims against them based upon the assertion that they are not "doing business" in the State of Tennessee. They support this argument by *implying* that they do not operate interactive internet websites over which their infringing karaoke products may be purchased by Tennessee residents. The PRIDDIS assertions are at best disingenuous; at their worst, they are sanctionable as false.

PRIDDIS Defendants point to the allegations of the Complaint, which they note only specifically names two websites; i.e., the "K SUPERSTAR" website operated by MEDIOSTREAM and the "PROSING" website operated by the MILLER Defendants. The PRIDDIS Defendants do not make the outright statement: i.e., that they do not and have not operated, or participated in the operation of, interactive internet websites reaching residents in the State of Tennessee. Rather, they *insinuate* that they do not and have not operated such sites simply on the basis that the name or names of such websites are not specifically identified in the Complaint.

Actually, the Complaint sufficiently apprises the PRIDDIS Defendants that the Plaintiff is alleging that they have operated interactive internet websites sufficient to satisfy the federal notice requirements for pleadings. Specifically, paragraph 20 of the Complaint provides, in pertinent part, as follows:

> "20. This Court has jurisdiction over each Defendant because the acts alleged herein have occurred and caused injury within the jurisdiction of this Court and because of Defendants' systematic and continuous advertising, distribution and sale of infringing recordings of one or more of Plaintiffs' musical copyrights within this jurisdiction. Specifically, Defendants are doing business in the Middle District of Tennessee through the distribution, advertising, and offering for sale of infringing karaoke recordings for interactive internet purchase in the Middle District of Tennessee."
>
> COMPLAINT, ¶ 20.

Moreover, the reason that the PRIDDIS *implied* statement to the Court that they do not possess, operate or participate in the operation of such websites is at least disingenuous is because such a statement is belied by the facts. In support of this Memorandum, Plaintiffs have concurrently filed the **DECLARATION OF DOROTHY D. GIBBY.** In her Declaration, Ms. Gibby attests and evidences the purchase of both PRIDDIS MUSIC and PROSOUND KARAOKE infringing recordings over the PRIDDIS MUSIC website, as well as over the PROSING website. (Gibby Declaration ¶¶ 1-4, Exhibits A and B thereto.)

As set forth below, the United States Court of Appeals for the Sixth Circuit, as well as every reported District Court decision to date has held that the operation of an interactive internet website sufficient to meet the constitutional minimum contacts requirements for jurisdictional and venue purposes. For these reasons, the argument made to this Court that the PRIDDIS Defendants do not operate or participate in the operation of interactive internet websites is false, for which the PRIDDIS Defendants should be faulted and for which their Motion to Dismiss should be denied.

d.) **The Middle District has Jurisdiction over the PRIDDIS Defendants and Venue is Proper**

i. **The Sixth Circuit has provided district courts with three procedural methods for ruling on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction**.

When presented with a Rule 12(b)(2) motion, a district court has three procedural alternatives: (1) "it may decide the motion upon the affidavits alone;" (2) "it may permit discovery in aid of deciding the motion;" or (3) "it may conduct an evidentiary hearing to resolve any apparent factual questions." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). In essence, the court must decide the motion solely upon the affidavits, or order discovery and then proceed under the second or third method. "The court has discretion to select which method it will follow . . . " Id. "However, the method selected affects the burden of proof the plaintiff must bear to avoid dismissal." Id.

If the Court chooses the first method and relies solely on the parties' affidavits[2] to reach its decision, "the plaintiff must make only a prima facie showing that personal jurisdiction exists in order to defeat dismissal." Id., at 1458-59, see also, *Inter-City Prods. Corp. v. Willey*, 149 F.R.D. 563, 570-71 (M.D. Tenn. 1993) (citing *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168-69 (6th Cir. 1988)). The burden of making a prima facie case is "relatively slight." *American Greetings Corp. v. Cohn,* 839 F.2d 1164, 1169 (6th Cir. 1988). If a plaintiff meets that slight burden "the motion should be denied, notwithstanding any controverting presentation by the moving party." *Serras v. Boehm*, 875 F.2d 1212, 1214 (6th Cir. 1989) (internal quotation marks and citation omitted) (reversing district court's dismissal where there were adequate allegations of jurisdictional facts); see also *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790,

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[2] No affidavit has been filed by PRIDDIS Defendants..

792 (W.D. Tenn. 2000) (holding "[t]he court is not to consider facts proffered by the defendant in conflict with those offered on behalf of the plaintiff.").

ii. This Court should apply the first method in ruling on Defendant's motion and, as such, Plaintiffs must make only a "relatively slight" *prima facie* showing of jurisdiction to defeat dismissal.

In reviewing Defendants' motion, this Court should proceed under the first method because no discovery has been taken in this case. If the Court proceeds under the first method, it must "construe all the facts in the light most favorable to [FAMOUS] and draw the most favorable inferences for the existence of jurisdiction." *Plant Genetic Sys., N.V. v. CIBA Seeds*, 933 F. Supp. 519, 522 (M.D.N.C. 1996) (*citing, Combs v. Baker*, 996 F.2d 673, 676 (4th Cir. 1993)); see also Theunissen, 935 F.2d at 1459; Inter-City Prods., 159 F.R.D. at 570. The Court must deny the motion to dismiss unless the plaintiff fails to make a *prima facie* showing that personal jurisdiction exists. See Inter-City Prods., 149 F.R.D. at 570-71; see also Theunissen, 935 F.2d at 1458-65 (reversing district court's dismissal because the plaintiff's factual allegations stated a *prima facie* case for jurisdiction).

It would be unfair for the Court to proceed under either the second or third method and, thus, hold Plaintiffs to a higher standard of proof that only applies in cases where discovery has taken place. Therefore, if the Court is unable to decide the motion to dismiss in Plaintiffs' favor at this state in the litigation, the only fair way for the Court to proceed would be to stay its ruling on the motion to dismiss, and allow Plaintiffs time to conduct discovery on this issue.[3] Once

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[3] Specifically, PRIDDIS Defendants *imply* that they do not operate an interactive website which advertises, distributes or sells its karaoke products in Tennessee. If the Court finds that Plaintiffs have not stated a *prima facie* case of personal jurisdiction over Defendants at this point, then the Court should allow Plaintiffs the opportunity to discover information regarding Defendants' marketing and distribution practices.

Plaintiffs have had the opportunity to discover additional jurisdictional facts to aid them in responding to Defendant's motion, the Court could revisit the question of personal jurisdiction.

iii. This Court Has Specific Personal Jurisdiction Over Defendants.

Federal Rule of Civil Procedure 4(k) grants this Court personal jurisdiction over any defendant "[w]ho could be subjected to the jurisdiction of a court of general jurisdiction is consistent with the Constitution and laws of the United States . . ." Thus, the Court must look to the Tennessee long-arm statute as well as Constitutional due process factors. *Mull v. Alliance Mortg. Banking Corp.*, 219 F. Supp. 2d 895, 903 (W.D. Tenn. 2002) ("To determine whether the court may exercise personal jurisdiction over a nonresident defendant, the court must first determine whether it has jurisdiction under the long-arm statute of the state in which the court sits.").

The Tennessee long-arm statute sets the Constitutional "minimum contacts" test as the minimum requirement for exercising jurisdiction over an out-of-state defendant. Tenn. Code Ann. § 20-2-214(a)(6) (setting as a basis for exercising jurisdiction as "[a]ny basis not inconsistent with the constitution of this state or of the United States," commonly referred to as the "minimum contacts" test). The Tennessee long-arm statute delineates "six specific events which may subject a nonresident to the jurisdiction of Tennessee courts." Inter-city Prods., 149 F.R.D. at 571. One such event is "**[a]ny** tortious act or omission within this state." Tenn. Code Ann. § 20-2-214(a)(2) (**emphasis added**); see also Inter-city Prods., 149 F.R.D. at 571.

iv. PRIDDIS's Interactive Internet Website Sales in Tennessee

As another Tennessee District Court has observed, the interactivity of an Internet website which results in the formation of contracts with residents of a foreign jurisdiction unequivocally subjects a defendants to personal jurisdiction:

> "***At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.*** At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. "

First Tenn. Nat'l Corp. v. Horizon Nat'l Bank, 225 F. Supp. 2d 816, (W.D. Tenn. 2002) (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)) (***emphasis added***). The **DECLARATION OF DOROTHY D. GIBBY** unequivocally demonstrates PRIDDIS has maintained an interactive website through which Tennessee consumers may view and purchase it karaoke products. (Gibby Decl., ¶¶ 3-4) Thus, PRIDDIS has utilized "knowing and repeated transmission of computer files over the Internet." PRIDDIS's solicitation, sale and shipment of those infringing products into Tennessee renders PRIDDIS amenable to this Court's jurisdiction under the Tennessee long-arm statute.

v. PRIDDIS's Sales/Distribution through Other Interactive Internet Karaoke Distributors/Retailers

PRIDDIS Defendants either ignore or fail to grasp that unauthorized *distribution* constitutes copyright infringement as well. The Copyright act expressly reserves the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending" to the copyright owner. (17 USC § 106(3)). The Committee Comments to §106 explain: "Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement." (17 USC § 106(3), *Committee Comments*).

Viewing the allegations and declarations in a light most favorable to the Plaintiffs, PRIDDIS has been committing massive copyright infringement by selling/consigning infringing discs to other internet karaoke *distributors*, such as the PROSING and MEDIOSTREAM Co-Defendants, all of whom, by the very definition of the "internet," are reselling the discs throughout the world…..including Tennessee. These interactive websites are distributing/selling infringing karaoke recordings of Plaintiffs' music copyrights, which were manufactured and distributed by PRIDDIS and the other defendants in the State of Tennessee, and have been so doing for what is as yet an undermined length of time. (The Gibby Declaration evidences purchases of PROSOUND infringing recordings of the Plaintiffs music copyrights over the PROSING website as well. Gibby Decl., ¶ 4). The PRIDDIS Defendants are also unquestionably liable as contributory infringers for the subsequent infringement by these other internet distributors/resellers. *Kalem vs. Harper Bros.*, 222 U.S. 55, 32 S. Ct. 20 (1911). The fact that PRIDDIS created its infringing karaoke discs knowing (and intending) that they would be distributed in Tennessee and cause harm to Plaintiffs in Tennessee is sufficient to meet the "arising from" test. See *Harris Rutsky & Co. Ins. Servs. V. Bell & Clements Ltd.,* 2003 U.S. App. LEXIS 8842, at *5 ("[Defendant's] alleged tortious conduct in London had the effect of injuring [plaintiff] in Tennessee. But for [defendant's] conduct, this injury would not have occurred.") PRIDDIS also has marketed and distributed its karaoke discs throughout Tennessee. Plaintiffs' claims arise from that distribution. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 at 1086 (defendant's "distribution of the software [at issue] and licensing of its use, are 'but for' causes of the alleged infringement."). PRIDDIS Defendants do not even address, much less quantify, the number of infringing discs distributed to, and through, *other* interactive internet web distributors/resellers (such as PROSING), much less the number of such discs that have been sold to residents of the State of Tennessee.

e.) Alternatively, this Court should Defer to the Ruling of the N.D. of California

In the event this Court is inclined to view the PRIDDIS Defendants' motion to dismiss favorably, Plaintiffs submit this Court should at most only stay these proceedings pending a decision by the District Court for the Northern District of California on their motion to dismiss that case. Some precedent exists for the proposition that the decision under the "first-to-file" rule is for the first filed Court which, should it decline jurisdiction, moots the motion to dismiss. (*Street v. Smith*, 456 F.Supp. 2d 451, (S.D. Miss.-2006)

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied. In the alternative, the Court should defer ruling on Defendant's motion and permit Plaintiffs to file their motion to dismiss in the Northern District of California, after ruling upon which, this matter may well be moot.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by U.S. Mail, postage prepaid, upon the following:

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